

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

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NO. 2016-P-1295

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MIDDLESEX SUPERIOR COURT  
Civil Action No. 1481CV04917

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IBNER CASSEUS, and LYONEL  
TELFORT, on behalf of themselves and  
all others similarly situated,

Plaintiffs/Appellees

V.

EASTERN BUS COMPANY, INC., and  
CHUCK WINITZER

Defendants/Appellants

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ON APPEAL FROM A JUDGMENT OF THE  
MIDDLESEX SUPERIOR COURT

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BRIEF OF DEFENDANTS/APPELLANTS  
EASTERN BUS COMPANY, INC., and  
CHUCK WINITZER

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**CORPORATE DISCLOSURE STATEMENT OF  
DEFENDANT EASTERN BUS COMPANY, INC.**

Pursuant to Supreme Judicial Court Rule 1:21,  
Defendant Eastern Bus Company, Inc. hereby certifies  
that it is a private, nongovernmental corporate party,  
and states that it does not have a parent corporation  
and that no publicly-held corporations own 10 percent  
or more of its stock.

**I. STATEMENT OF ISSUES PRESENTED**

1) Whether the Superior Court erred in finding that the clear and unambiguous common carrier overtime exemption language of M.G.L. c. 151, § 1A(11), does not apply to bus driver Plaintiffs/class members in this case, despite finding that all of the class members meet the statutory definition of an exempt employee ("[M.G.L. c. 151 Section 1A] shall not be applicable to any employee who is employed...by an employer licensed and regulated pursuant to Chapter [159A].").

2) Whether the Superior Court erred in failing to follow its own prior holding in this case by not applying the Federal Motor Carrier Act exemption analysis in the present matter.

3) Whether the Superior Court erred in finding that charter service provided to municipal customers, which consists of exactly the same service as provided to non-municipal customers, is not similarly regulated pursuant to the common carrier law, Chapter 159A.

**II. STATEMENT OF THE CASE**

**a. Summary of the Argument**

Defendant, Eastern Bus Company, Inc. ("Eastern Bus" or "Company"), is a bus transportation company that operates buses in Massachusetts and nearby states. As such, it is regulated by provisions of both the Federal Motor Carrier Act and the equivalent state "common carrier" law, M.G.L. c. 159A. Plaintiffs are bus drivers who claim they are entitled to overtime compensation, despite an express state statutory exemption for employers regulated by the state common carrier law.

The primary issue on appeal arises from the Superior Court's failure to apply the common carrier exemption of the Massachusetts overtime statute, M.G.L. c. 151, § 1A(11), to the Plaintiffs, a class of bus drivers, all of whom meet the unambiguous statutory definition of an exempt employee.

Although Section 1A provides that employees in Massachusetts are generally entitled to one and one-half times their regular rate of pay for all hours worked over 40 during a given work week, the statute has 20 separate exemptions to this general requirement. Relevant to this appeal is Subsection 11 which states, in plain and unambiguous terms, that the entitlement to receive overtime wages,

shall not be applicable to any employee who is employed...by an employer licensed and regulated pursuant to chapter one hundred and fifty-nine A.

M.G.L. c. 151, § 1A(11)(emphasis added).

The application of this statutory exemption is straightforward and should have led the Superior Court to dismiss the action in favor of Defendants Eastern Bus Company, and Charles Winitzer. The Superior Court failed to apply the unambiguous language of the statutory exemption, even though it recognized

sufficient undisputed facts in the record that supported a direct application of the exemption. Significantly, the Superior Court found that *all* of the class members meet this statutory exemption definition, because they are *all* employed as bus drivers by Eastern Bus, an employer licensed and regulated pursuant to Chapter 159A. Plaintiffs did not dispute these facts. The Court further held that the class members perform "a **significant amount** of charter work that *is* regulated under Chapter 159A." Casseus v. E. Bus Co.(II), No. 14CV4917H, 2016 WL 3344717, at \*2 (Mass. Super. June 4, 2016)(emphasis **added** and in *original*).

Despite acknowledgement of these undisputed facts, the Superior Court nevertheless denied Defendants' Motion for Summary Judgment as to the failure to pay overtime claim because it concluded that class members may also perform other duties during a given work week. The Court held, without providing any support under Massachusetts law or otherwise, that Eastern Bus is only "partially exempt from the Chapter 151 overtime requirement." Id.

The Superior Court's Order fails to effectuate the Legislature's unambiguous statutory directive, but

instead effectively amends the exemption language contained within M.G.L. c. 151, § 1A; it alters Subsection 11 to require not only that an employee be "employed ... by an employer licensed and regulated pursuant to chapter [159A]," but also that the employee perform certain components of regulated work, for the exemption to apply.

The Superior Court committed a clear error of law when it disregarded the plain and unambiguous statutory language chosen by the Legislature, and added additional criteria to the exemption that are not set forth in the statute.

Even if it were necessary to look beyond the clear statutory language creating an overtime exemption covering all employees employed by an exempt employer (i.e., an M.G.L. c. 159A License holder), the undisputed record below demonstrates that the work performed by affected class members unquestionably meets the requirements of the exemption.

First, even if the Court needed to determine "how much" exempt work needs to be performed by an employee for the common carrier exemption to apply, it should have looked to the rules under the parallel Federal overtime exemption for common carriers. See 29 U.S.C.

§ 213(b)(1). Specifically, the Federal Motor Carrier Act ("MCA") exemption to the Fair Labor Standards Act ("FLSA") is the equivalent Federal law regulating overtime available for employees in the transportation industry. Under both the State and Federal exemptions, driver qualifications and maximum hours are established by agencies tasked with ensuring the safety of the roadways (Secretary of Transportation at the federal level and the Department of Public Utilities in Massachusetts).

The Superior Court further erred in concluding that charter service performed by Eastern Bus for schools is not regulated pursuant to Chapter 159A, despite overwhelming precedent to the contrary. The Superior Court did not address any arguments on this point and without proper analysis found that "school charters" performed by class members should not be included to determine whether a sufficient amount of exempt work is performed by the class members. Because the Superior Court held that Plaintiffs are only entitled to overtime compensation for non-regulated

work performed over 40 hours,<sup>1</sup> this error is significant and should similarly be reversed.

For these reasons, this Court should determine that the Superior Court erred when it (1) failed to directly apply the unambiguous statutory language, (2) otherwise failed to utilize the equivalent Federal rules to determine if sufficient "exempt" work was being performed, and (3) improperly determined that "school charters" should be excluded when determining if exempt work was performed.

**b. Procedural Background**

Plaintiffs filed a single count complaint against Defendants on May 30, 2014 for failure to pay overtime (Count I). Defendants later moved to dismiss the action pursuant to Mass. R. Civ. P. 12(c), which the Superior Court denied on June 10, 2015. After discovery and the filing of a first and second amended Complaint (to add a second count alleging retaliation related to the discharge of the named plaintiffs (Count II)), on March 28, 2016, Defendants moved for

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<sup>1</sup> Casseus (II), No. 14CV4917H, 2016 WL 3344717, at \*2 ("[the named Plaintiffs] and other drivers employed by Eastern Bus performed, and did not receive overtime wages for some amount of non-regulated, and thus non-exempt, work in excess of 40 hours per work. They are therefore entitled to payment for that work[.]"(emphasis added)).

summary judgment as to both Counts contained in Plaintiffs' Complaint. Plaintiffs contemporaneously moved for partial summary judgment as to Count I.

On June 8, 2016, the Superior Court entered an interlocutory Order denying Defendants' Motion for Summary Judgment and granting Plaintiffs' Motion for Partial Summary Judgment.

On July 8, 2016, Defendants filed a Petition for Relief from the Interlocutory Order with a Single Justice of the Appeals Court, pursuant to M.G.L. c. 231, § 118, requesting permission to appeal the Superior Court's Order.<sup>2</sup> Defendants asserted, *inter alia*, that the Superior Court committed a clear error of law by failing to apply the plain and unambiguous statutory overtime exemption to the Plaintiffs, despite the Court finding that *all* of the class members minimally met the definition of an exempt employee pursuant to M.G.L. c. 151, § 1A(11).

Plaintiffs objected and filed their Response to Defendants' Petition for Interlocutory Relief on July

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<sup>2</sup> Because Defendants' Motion for Summary Judgment on Plaintiff Telfort's retaliation claim (Count II) was denied, and a damages trial would otherwise be forthcoming with regard to Count I, the Superior Court's Order was not a "final judgment" and Defendants could not directly appeal without leave of this Court.

20, 2016, and a hearing was held before Associate Justice Wolohojian on July 25, 2016.

On July 27, 2016, after the hearing and a review of the entire summary judgment record, Associate Justice Wolohojian granted Defendants' Petition and issued the following Order:

After hearing, the defendants are granted leave to file a notice of appeal from the order of the Middlesex Superior Court No. 1481CV04917 (Curran, J.) entered on June 8, 2016, denying defendants' motion for summary judgment and allowing plaintiffs' motion for partial summary judgment ... Further proceedings in the trial court are stayed pending the appeal.

Ibner Casseus, et al. v. Eastern Bus Company, Inc., et al., Docket No. 2016-J-0280 (Mass. App. Ct., July 27, 2016)(Wolohojian, J.). Defendants timely filed their Notice of Appeal on August 4, 2016.

**c. Factual Background**

**i. Eastern Bus's Transportation Services - Generally**

Defendant Eastern Bus is a transportation company located within the Commonwealth of Massachusetts. See Record Appendix, Volume I, at A54.<sup>3</sup> Defendant Charles

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<sup>3</sup> References to the Record Appendix, Volume I will be cited hereinafter as "VI at A[page number]." Record Appendix, Volume II will be cited hereinafter as "VII at A[page number]."

Winitzer is the owner and President of Eastern Bus. VI at A68.

Eastern Bus's work is comprised of two types of transportation services. The first is "charter" service, which involves a driver picking up a group of people at one location and transporting them to a destination, as requested by the customer. VI at A56-A67; A119-A120.

In order to perform charter service in Massachusetts, companies are required to petition for, demonstrate the proper qualifications for, obtain, and subsequently maintain a Chapter 159A, § 11A License issued by the Department of Public Utilities ("DPU" or "Department"). VI at A54. The DPU "monitor[s] and oversee[s] surface transportation in the Commonwealth with the overall goal of protecting public safety[,]"<sup>4</sup> and through its regulations, prescribes driver qualifications and the maximum hours of service for drivers of companies licensed and regulated pursuant to Chapter 159A.

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<sup>4</sup> <http://www.mass.gov/eea/grants-and-tech-assistance/guidance-technical-assistance/agencies-and-divisions/dpu/dpu-divisions/transportation-division/transportation-division-responsibilities.html>

In 1997, the year Eastern Bus was established, the Company filed a petition with the DPU "for a license to engage in the business of charter service by motor vehicles, in accordance with the provisions of G.L. c. 159A, § 11A, as amended." VI at A54; A69. On December 2, 1997, Mr. Winitzer was required to attend a public hearing, conducted by the DPU, to provide the Department with information to help it determine whether to grant or refuse to grant Eastern Bus a Chapter 159A License. VI at A54; A69.

On or before March 4, 1998, after determining that Eastern Bus possessed the proper qualifications to perform charter service, the DPU issued it a Chapter 159A License, which the Company has continuously maintained since. VI at A54; A69.<sup>5</sup>

Eastern Bus provides charter service throughout the entire year - including weekends and during the

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<sup>5</sup> To maintain its Chapter 159A Charter License, Eastern Bus is required to abide by the DPU's rules and regulations. The DPU has the right to suspend or revoke a company's License for violation of Chapter 159A or the regulations and Orders of the Department. VI at A54.

summer - within Massachusetts and the surrounding states.<sup>6</sup> VI at A56-A67; A129.

The other service Eastern Bus provides is "school transportation" pursuant to contracts entered into with 11 municipalities and schools in Massachusetts. VI at A99. "School transportation" consists of transporting students to school from home in the morning, and then from school to home in the afternoon along the same route while making the same stops.<sup>7</sup> VI at A101. The price municipal customers pay for school transportation service is predetermined by contract based upon the daily cost of transportation multiplied by the 180 school days each school year. Eastern Bus is guaranteed to be paid this amount. VI at A70; A112.

Eastern Bus either owns or leases all of its own buses and none of them are under the control of any municipality. VI at A69. Any time Eastern Bus acquires a new bus, it is required to register it with the DPU.

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<sup>6</sup> During only seven exemplar months within the relevant period, Eastern Bus performed 122 interstate charter trips. VI at A129.

<sup>7</sup> Customers who have contracted with Eastern Bus to provide school transportation service are referred to herein as "municipal customers." This definition was similarly used throughout the summary judgment documents filed with the Superior Court.

**ii. Eastern Bus's Charter Service**

A significant portion of Eastern Bus's business consists of performing charter service. When a customer hires Eastern Bus to provide charter service, the Company creates an invoice (or charter agreement), for each individual job. VI at A56-A67. The charter agreement provides information about times and locations of the pickup and destination, the costs and fees associated with the service, and other information related to the specific charter job. VI at A56-A67. Each charter is then assigned an individual reference number. VI at A56-A67. Eastern Bus employees then record reference numbers on their time sheets to track the charter jobs they perform. VI at A103.

Each Eastern Bus charter job is unique and varies in terms of time and geographic scope, although many customers rehire Eastern Bus to perform similar charters later. VI at A56-A67; A108; A119-A120. Charter customers pay for the exclusive use of an Eastern Bus vehicle for the duration of each individual charter. VI at A69.

Eastern Bus provides charter service for a wide variety of non-municipal customers<sup>8</sup> and for many of its municipal customers. VI at A56-67. Eastern Bus also provides charter service for municipalities and schools for which it does not provide school transportation. For example, Eastern Bus is one of the Boston School Department's preferred vendors that provide "Field Trip Transportation for the Boston Public Schools." VI at A92-A96. Eastern Bus does not provide school transportation for Boston, which is provided by another company called Veolia Transportation Services, Inc. ("Veolia"). VI at A97.

To bid on becoming an approved vendor for "Field Trip Transportation" for Boston Public Schools, Eastern Bus was required to certify that it "is licensed by the Commonwealth to provide charter service," and that its drivers are "properly licensed to provide charter service." VI at A92-96.

When municipal customers hire Eastern Bus to perform charter service, which often consists of transporting a group on a field trip or to an athletic

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<sup>8</sup> These customers include preschools, church groups, non-profit organizations, wedding parties, colleges and universities, and professional groups, among others. VI at A56-A67 A107; A121.

event, they are provided the same individual charter agreements for each charter that are furnished to non-municipal customers. VI at A58-A61. These charters result in user charges, paid only when services are rendered. These are distinct, separate agreements and charges from payments for daily school transportation, which is paid at a guaranteed annual rate. VI at A70.

The Plaintiffs perform charter jobs for both private and municipal customers, and there are many weeks in which they only perform charter service, or spend significantly more hours performing charter service than school transportation. VI at A72-91.

Eastern Bus requires that all of its drivers hold a charter license, VI at A114; A117, as mandated by Chapter 159A, § 9, and at various times it will hire and employ drivers who only perform charter service. VI at A114; A117.

Mr. Winitzer, who oversees Eastern Bus's Somerville bus yard, along with his managers at the Company's other bus yards, assign drivers to charters on a given day. VI at A104-A106; A125. In addition to performing school runs, all Eastern Bus drivers are expected to be able to perform charter service when directed to do so; for this reason the Company

requires all of its drivers to maintain a Charter License. VI at A114; A117.

A significant portion of Eastern Bus's revenue derives from the Company's charter service. For example, in 2012 during the months of March, June, July and October alone,<sup>9</sup> Eastern Bus performed **310, 399, 442 and 857** charter jobs, for which it was paid **\$812,248.92**. VI at A70-A71. Similarly, during March, July and October 2015, Eastern Bus performed **388, 655, and 1,257** charter jobs, respectively, for which it was paid **\$1,038,860.72**. VI at A71.

### **III. ARGUMENT**

- a) Plaintiffs, DPU-Licensed Charter Bus Drivers are Exempt from Overtime Requirement Under the Clear and Unambiguous Common Carrier Exemption of M.G.L. c. 151, § 1A(11) Because they are all "Employed by an Employer, Licensed and Regulated Pursuant to Chapter [159A]"**

The issue on appeal is straightforward: are all of the class members employees "employed by an employer licensed and regulated pursuant to Chapter [159A]" and thus exempt from the overtime requirement under Massachusetts law? Because it is *undisputed* that

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<sup>9</sup> Because Eastern Bus estimated that it performed approximately 35,000 charter jobs during the relevant time period, the parties agreed during discovery to have Defendants produce charter sheets from exemplar months as representative of the charters jobs it performs throughout the entire year. Defendants allowed Plaintiffs to choose the exemplar months.

all of the class members fall within the statutory definition, the Superior Court erred when it denied Defendants' Motion for Summary Judgment (and granted Plaintiffs' Motion for Partial Summary Judgment), where Plaintiffs are exempt pursuant to the express exemption of M.G.L. c. 151, § 1A(11). Accordingly, the Superior Court's Order should be vacated, and Summary Judgment should enter for Defendants.

**i. When Statutory Language is Clear and Unambiguous, it is Conclusive to Legislative Intent**

Although M.G.L. c. 151, § 1A generally requires that Massachusetts employers compensate employees at one and one-half times their regular rate of pay for all work performed in excess of 40 hours in a workweek, the statute exempts 20 categories of employees from the overtime pay requirement. The relevant exemption in this case, Subsection 11, provides that entitlement to overtime compensation,

shall not be applicable to any employee who is employed by an employer licensed and regulated pursuant to chapter one hundred and fifty-nine A.

M.G.L. c. 151, § 1A(11)(emphasis added). It is undisputed that since 1998, the year Eastern Bus was issued a Chapter 159A Charter License by the DPU, the

Company has continuously been "licensed and regulated pursuant to M.G.L. c. 159A." VI at A54; A69.

The most basic and widely accepted tenet of statutory construction is that "[w]here the language of a statute is clear and unambiguous, it is conclusive as to legislative intent[.]" Pyle v. Sch. Comm. of S. Hadley, 423 Mass. 283, 285 (1996) (citations omitted), and courts must "give effect to the plain and ordinary meaning." Victor V. v. Commonwealth, 423 Mass. 793, 794 (1996); see also, Leary v. Contributory Ret, Appeal Bd., 421 Mass. 344, 345 (1995)("[S]tatutory language itself is the principal source of insight into the legislative purpose ... we need not look beyond the words of the statute where the language is plain and unambiguous." (quotations and citations omitted)).

Subsection 11 is both clear and unambiguous, and the Superior Court erred by failing to give effect to its plain meaning. All of the class members are employees "employed ... by an employer licensed and regulated pursuant to chapter one hundred and fifty-nine A" and Defendants are entitled to summary judgment on this basis alone.

The Superior Court incorrectly held that the language “any employee ... employed ... by an employer licensed and regulated pursuant to chapter [159A]” does not apply to the Plaintiffs, despite determining that they *all* meet the clear statutory definition. Casseus (II), No. 14CV4917H, 2016 WL 3344717, at \*1.

Because the plain language of the statute is unambiguous and simply cannot be interpreted to impose the state overtime requirement to employees of a Chapter 159A-regulated employer such as Eastern Bus, the Superior Court’s Order should be vacated and summary judgment entered for Defendants.

**ii. Massachusetts Courts Apply Similar Exemptions to the Massachusetts Overtime Law in the Same “Blanket” Manner Rejected by the Superior Court**

As mentioned above, the Superior Court provided minimal analysis or support for its decision. Instead, it simply referred to the prior judge’s decision entered on Defendants’ Mass. R. Civ. P. R. 12 Motion which was based only on the facts alleged in the Complaint and prior to discovery. The Superior Court did not provide any analysis when relying on the Rule 12 Order, and failing to apply the exemption language to the class members (despite similarly finding that they all meet the definition of an exempt employee *and*

perform a "significant" amount of exempt work).

Instead the court simply adopted the earlier reasoning of the prior judge.

This statutory interpretation has produced confusing and unsupported results. Massachusetts employers are entitled to rely on express statutory direction without risking being subject to unknowable legal risk. Indeed, in this case, the Superior Court determined that the record demonstrated that the Eastern Bus and its employees "perform[] a significant amount of charter work that *is* regulated under Chapter 159A[.]" Id. at \*2. In fact, the Superior Court reached no conclusion from the record that the enterprise coverage provided under the Section 1A(11) exemption should not apply to Eastern Bus.

Significantly, the Superior Court's holding ignored numerous Massachusetts cases which have applied similar "blanket" overtime exemption language to *all* affected employees if the statutory exemption applies.<sup>10</sup>

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<sup>10</sup> See, e.g., Gately v. Notre Dame Academy, Case No. PKLCV201000153, 2013 WL 10005816, \*5, n.3 (Mass. Super. Sept. 13, 2013)(custodian at a non-profit school was not entitled to overtime for hours worked over 40 in a work week because section 1A does not apply to "any employee who is employed ... in a non-

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profit school or college." M.G.L. c. 151, § 1A(17). "[P]laintiff is not entitled to the overtime rate because, as a non-profit school, it is exempt from paying the overtime rate pursuant to G. L. c. 151, § 1A."); Manning v. Boston Med. Ctr. Corp., No. CIV. A. 09-11724-RWZ, 2011 WL 864798, at \*3 (D. Mass. Mar. 10, 2011)(employees of a hospital were not entitled to overtime for hours worked over 40 in a work week because section 1A does not apply to "any employee who is employed...in a hospital[.]" M.G.L. c. 151, § 1A(16). "Plaintiffs are also exempt from the coverage of the Massachusetts statutes invoked in Count[]...2 which...exclude[s] ... 'any employee who is employed ... in a hospital[.]'""); Norceide v. Cambridge Health All., 814 F. Supp. 2d 17, 27 (D. Mass. 2011)(court dismissed claim for failure to pay overtime pursuant to M.G.L. c. 151, §1A, because the employees - a registered nurse, a secretary and a patient access representative - worked in a hospital and were not entitled to overtime pay. "Under state law, a worker employed in a 'hospital...' is not protected by the overtime provision."); Cavallaro v. UMass Mem'l Health Care, Inc., No. CIV.A. 09-40181-FDS, 2010 WL 9433452, at \*6 (D. Mass. Dec. 20, 2010)(the court dismissed failure to pay overtime claim pursuant to M.G.L. c. 151, §1A, holding that "[t]he statute clearly does not apply to employees who work in a hospital. Mass. Gen. Laws ch. 151, § 1A(16). Because [employees] are current or former employees of a hospital, the statute does not extend to them any rights regarding overtime compensation."); Fernandes v. Quarry Hills Associates, L.P., No. CIV.A. 09-11912-JGD, 2010 WL 5439785, at \*3 (D. Mass. Dec. 28, 2010)("the defendants filed a motion to dismiss the plaintiffs' complaint in the State Court Action, arguing, *inter alia*, that restaurant workers are expressly exempt from the overtime statute pursuant to Mass. Gen. Laws ch. 151, § 1A(14). Thus, on October 21, 2008, the motion to dismiss was allowed in part...with the state court ruling that, under Massachusetts law, restaurant workers are exempt from overtime pay."; see also, Fernandes, Jr. et al. v Quarry Hills Associates L.P. et al., NOCV2008-00524 (Mass. Super., Oct. 21, 2008) ("As restaurant employees, c. 151, s. [1]A does not apply to plaintiffs.").

Further, in addition to the cases set forth above, the Massachusetts Department of Labor and Workforce Development ("DLWD"), the State agency charged with administering and interpreting the Massachusetts overtime law (and to which this Court affords substantial deference, Swift v. AutoZone, Inc., 441 Mass. 443, 450, (2004)), has broadly applied overtime exemptions in a similar manner. For example, the DLWD previously opined on the applicability of M.G.L. c. 151, § 1A to employees who work in a hotel. The DLWD was asked "whether banquet servers employed by a hotel, who perform work in a hotel or on hotel property, are exempt from overtime pursuant to M.G.L. c. 151, § 1A(12)." Op. Letter MW-2006-001 (Mar. 10, 2006). Subsection 12 states in plain and unambiguous terms, that, "[section 1A] shall not be applicable to any employee who is employed ... in a hotel, motel, motor court or like establishment."

The Department found that all of the employees of the hotel enterprise were exempt from the overtime requirement, based on the unambiguous exemption language of Section 1A(12):

[W]e are constrained to construe the statute in accordance with its plain meaning. See Shabshelowitz v. Fall River Gas Co., 412 Mass. 259, 262 (1992). ("[t]he language of the statute is the best indication of

legislative intent.") Therefore, we interpret the state hotel exemption to include all workers who work in some aspect of hotel operations, including banquet services, within the physical confines of a hotel property.

Id. (emphasis added).

In the present matter, the exemption language found in Subsection 11 similarly leaves no room for interpretation as its terms are plain and unambiguous, and the courts are similarly "constrained to construe the statute in accordance with its plain meaning." There is no indication in the statute that the exception was intended to be limited to employees performing specific jobs or who work in specific jobs for certain portions of their workweek. Any alternative reading of this language would be to ignore the legislative intent reflected in the express language it chose.

In fact, had the Massachusetts Legislature intended such a limitation, as the Superior Court found, it would have included certain qualifiers or limitations, as it did in several other listed exemptions to M.G.L. c. 151, § 1A. See, e.g., M.G.L. c. 151, § 1A(7)("[section 1A] shall not be applicable to any employee who is employed ... **as a switch board**

**operator** in a public telephone exchange,"); M.G.L. c. 151, § 1A(15)("[section 1A] shall not be applicable to any employee who is employed ... as a garageman, **which term shall not include a parking lot attendant**"). The Legislature has even gone further in narrowing an overtime exemption depending on the specific classification of employee *and* the type work in which that employee is engaged. See, M.G.L. c. 151, § 1A(19) ("[section 1A] shall not be applicable to any employee who is employed ... **as a laborer engaged in agriculture and farming on a farm.**"). If it had intended to narrow the exemption in the manner suggested by the court below, the Legislature would have included limiting language, as it did in the other exemptions.

The fact that additional limiting language was not included in Subsection 11 only supports the conclusion that the Superior Court erred by "reading in" additional language to the exemption. See Bay State Gas Co. v. Local No. 273, Util. Workers Union of Am., 415 Mass. 72, 75 (1993)("If the Legislature has intentionally omitted a provision from a statute, no court may then reintroduce it."). By effectively amending, revising and narrowing the Section 1A(11)

exemption, the Superior Court engaged in judicial legislation, an action the SJC consistently rejects. See, e.g., Pierce v. Christmas Tree Shops, Inc., 429 Mass. 91, 93 (1999) ("The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative, body. See art. 30 of the Massachusetts Declaration of Rights"), citing Rosenbloom v. Kokofsky, 373 Mass. 778, 780-81(1977).

**iii. The Superior Court's Policy Concerns Are Misplaced and Cannot Justify Ignoring the Unambiguous Statutory Exemption**

Part of the Superior Court's rationale when it denied Defendants' initial Rule 12 motion to dismiss was its policy concern that applying the statute in a "blanket" manner would "produce curious results[,]" that would be unfair to non-drivers being "robbed of their overtime rights."<sup>11</sup> See Casseus v. E. Bus Co. (I), Inc., No. 14-04917, \*7 (Mass. Super. Jun. 10, 2015)(Gordon, J.). General policy concerns do not provide a basis for a court to ignore the legislative enactments. See Serrazina v. Springfield Public Schools, 80 Mass. App. Ct. 617, 624-25 (2011), aff'd,

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<sup>11</sup> This concern was expressed by the Rule 12 Motion Judge and subsequently adopted by the Court in its summary judgment decision.

464 Mass. 1011 (2013)(expressing sensitivity to school system's argument that a suspended teacher should not receive back pay when under indictment, but concluded that it was not free to ignore or alter unambiguous statutory language).<sup>12</sup>

Moreover, it should be noted that Eastern Bus employees who are not class members (i.e., who are not bus drivers) are almost certainly not exempted from the Federal overtime requirement. See 29 U.S.C. § 216. In an opinion letter, the DLWD similarly considered this factor when contemplating the application of the

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<sup>12</sup> See also, Pierce v. Christmas Tree Shops, Inc., 429 Mass. at 93 (Plaintiff sued to have a lienholder for medical costs pay a portion of her attorney's fees incurred in pursuing the tortfeasor, despite the statute not requiring it. The SJC rejected the argument. "Even if an injustice or hardship were to result, this court cannot insert words into a statute, where, as here, the language of the statute, taken as a whole, is clear and unambiguous."); Rosenbloom, 373 Mass. at 780 (the SJC would not ignore unambiguous statutory language based upon equitable considerations. "It is clearly possible that [the statute] will, at times, produce harsh results. However, the question whether an alternative formulation would be more equitable is beyond our authority to decide. The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative, body...We cannot interpret a statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires a different construction.").

overtime exemption for hotel workers contained in

Subsection 12. The Department stated:

While this interpretation [i.e., exempting *all* employees who work in a hotel] may appear to exempt a broad spectrum of workers, as a practical matter, most hotel workers will still be entitled to overtime under federal law, as the FLSA no longer categorically excludes hotel employees.

Op. Letter MW-2006-001. Thus, the lower court's policy concerns are likely misplaced because non-driver employees (who are not class members in this case), are likely entitled to overtime compensation under Federal law.<sup>13</sup>

It is important to note that in the present matter, *all* of the class members are bus drivers, required to hold a license to drive charters, and either perform exempt work, or can reasonably be expected to perform exempt work on a daily basis. Consequently, *all* of the class members are employed by an employer licensed and regulated pursuant to Chapter 159A in a capacity in which they perform work regulated by Chapter 159A.

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<sup>13</sup> The class members, who are bus drivers, would not likely be entitled to overtime pay under Federal law as they are all subject to the Motor Carrier Act exemption as well (explained in further detail in section III,b, *infra*). Notably, Plaintiffs did not file a similar claim for failure to pay overtime under FLSA.

Plaintiffs have argued and Defendants acknowledge that overtime exemptions are generally to be construed narrowly; this does not mean, however, that they are to be completely disregarded. Eastern Bus obtained, and has maintained continuously for 18 years, a Chapter 159A License as it is indisputably required to do; it does so because *it must be so licensed to perform its services*. Massachusetts has enacted a comprehensive regulatory scheme to ensure safe operation of common carriers that far exceed regulations affecting other employers. At the same time, Employers in Massachusetts that obtain a Chapter 159A License by meeting the strict licensing standards applied by the DPU, are exempted from the overtime requirement. To conclude otherwise would significantly undermine the DPU's licensing obligations under the statute - a position that the Supreme Judicial Court ("SJC") has rejected.<sup>14</sup>

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<sup>14</sup> See Goodwin v. Dep't of Pub. Utilities, 351 Mass. 25, 26-27 (1966) ("The department 'may ... grant or refuse to grant a license,' and has a broad power of revocation of licenses which have been granted. The wide latitude conferred completely to deny an application, on a reasonable construction, includes according the lesser privilege ... **The department is entrusted with the highly important function of applying the prescribed statutory standards.** These include an adjudication that the service is consistent

**b) Class Members Perform a "Significant Amount" of Work Regulated Pursuant to Chapter 159A, § 11A, and The Court Should Analyze Subsection 11 Under the Analogous Federal MCA Exemption**

Even if, *arguendo*, this Court were to conclude, like the Superior Court, that there was no complete enterprise exemption contained in Section 1A(11), and determines that the statute requires that employees must perform a prescribed amount of regulated work for the exemption to apply, the Court should nevertheless vacate the Superior Court's Order. This is because there is overwhelming record evidence that all of the class members regularly perform work regulated under Chapter 159A and would meet any threshold standard that this Court might read into the Section 1A(11) exemption.

Although this is the first Massachusetts appellate court in Massachusetts to interpret the confluence of M.G.L. c. 151, § 1A(11) and M.G.L. c. 159A, § 11A, the SJC has long held that the Federal Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §201, et seq., provides

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with the public interest; that it is required by public convenience and necessity; and that the licensee has the fitness and ability to perform the service.") (emphasis added); see also, M.G.L. c. 159A, § 11A ("The department may, after public hearing, grant or refuse to grant a license to engage in the business of rendering charter service, and may, after notice and hearing, suspend or revoke such a license for cause.").

useful and relevant guidance when interpreting the state overtime statute. See e.g., Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 170, (2000). With regard to Subsection 11, the Order on Defendants' Rule 12 Motion - upon which the court below in part based its subsequent summary judgment decision - analyzed the analogous FLSA exemption -- the Federal Motor Carrier Act ("MCA") exemption. See Casseus v. E. Bus Co. (I), Inc., No. 14-04917 (Mass. Super., Jun. 10, 2015)(Gordon, J.)("the substantial weight of federal authority has construed **an analogous exemption under the Fair Labor Standards Act** to cover employees of 'motor carriers only and to the extent their actual work entails operation of the qualifying vehicles[.]'" (emphasis added)<sup>15</sup>), quoting the Court's previous holding in Reis v. Knight's Airport Limousine Serv., No. WOCV2014-01558-C, 2014 Mass. Super. Lexis 175, \*11 (2014)(Gordon, J.) ("the Court here sees wisdom in aligning its interpretation of Section 1A(11)

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<sup>15</sup> Notably, while the trial court analyzed Subsection 11 under the analogous MCA exemption, it denied the Rule 12 Motion only because the Complaint did not allege that Plaintiffs performed any regulated work (it reached the same conclusion in Reis). This decision was made prior to discovery. After extensive charter and payroll records were produced, it was undisputed that class members *all* either perform or are expected to perform regulated work; this should have resulted in a different conclusion at summary judgment.

with the prevailing view of a parallel exemption under the [FLSA's MCA exemption].")). As discussed in more detail below, this is an apt analogy, and the manner in which courts have construed the Federal MCA overtime exemption should guide this court in interpreting the Massachusetts Section 1A(11) overtime exemption.

While the MCA provides a useful basis for analyzing Section 1A(11) the MCA exemption is significantly narrower. The MCA exemption applies to "any employee with respect to whom the [Federal] Secretary of Transportation has power to establish qualifications and maximum hours of service[.]" See 29 U.S.C. § 213(b)(1). Similarly, at the state level, the state DPU (which licenses and regulates common carriers, such as Eastern Bus) has the power to both establish the qualifications of the drivers and employers that perform charter service,<sup>16</sup> and to set their maximum hours of service.<sup>17</sup>

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<sup>16</sup> See, M.G.L. c. 159A, § 9 ("No person shall drive any motor vehicle under authority of this chapter unless he shall ... be licensed by this department. No such license shall be issued by the department to any person ... who has not qualified in accordance with the department's requirements ... [S]aid department may revoke or suspend such license at any time for such cause as may seem to it sufficient."); see also M.G.L. c. 159A, § 11A; VI at A54.

<sup>17</sup> See, 220 Mass. Code Regs. 155.02 ("No owner of a motor bus shall cause or allow any driver to drive a motor bus for more than ten hours in any period of 24

Thus, due to the nearly identical regulatory powers of the Secretary of Transportation and the DPU to regulate certain transportation companies for the purpose of ensuring roadway safety, it is clear that the MCA exemption is the analogous Federal statute this Court should use to interpret its state law equivalent.<sup>18</sup> Indeed, there is no reason for the Court to interpret the Subsection 11 exemption from overtime requirement under Massachusetts law differently than the MCA exemption from overtime under the FLSA.

In applying the MCA exemption and the Section 1A(11) exemption congruously, the record evidence demonstrates that the Plaintiff class drivers perform

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consecutive hours, unless such driver be afforded eight consecutive hours of rest immediately following the ten hours aggregate drive." ). A "motor bus" is defined as "any motor vehicle operated ... for transporting passengers for hire under a charter license ... issued by the Department." 220 Mass. Code Regs. 155.01.

<sup>18</sup> The Defendants in Reis argued that the language in the two exemptions differed and therefore should not be applied. The Superior Court disagreed. While acknowledging slight textual differences between the two exemptions, the court held that "the difference in language cannot obscure the larger fact that both statutes exempt employees whose work locates them within a regulated segment of the transportation industry. In this respect, the two laws share a fundamental affinity in purpose more powerful than the modest variations in phraseology adopted by their respective legislatures to express it." Reis at \*12, n.3.

sufficient covered charter work for the exemption to apply. The sheer number of charters performed by Plaintiffs supports a finding that Subsection 11 applies to *all* of the class members in this case.

In a factually similar case involving the application of the MCA, Resch v. Krapf's Coaches, Inc., 785 F.3d 869 (3d Cir. 2015), the plaintiff brought a collective action on behalf of himself and 33 other drivers of the employer ("KCI"), seeking unpaid overtime, pursuant to the FLSA and state law.

KCI provided bus services and operated on 32 set routes, only four of which crossed state lines.

Of the **13,956** total trips Plaintiffs drove, **178 (or 1.3%) required them to cross state lines**. Sixteen plaintiffs **never crossed state lines**[.]

Id. at 870(emphasis added). The revenue generated from this work fluctuated between *only* "1.0% and 9.7%" of the employers' income. Id.

In determining whether the MCA exemption applied, the Third Circuit held there were two considerations: 1) the "class of the employer" and 2) the "class of work the employees perform." Id. at 872. As there was no dispute that KCI was a "motor carrier," and thus, the

class of employer covered by the exemption, the only question was,

whether Plaintiffs – many of whom rarely or never crossed state lines – satisfy the second requirement by being a member of a class of employees engaging [in exempted work].

Id.

In making its determination, the court held that, "it is 'the character of the activities rather than the proportion of either the employee's time or of his activities' that controls." Id. at 874, citing Levinson v. Spector Motor Serv., 330 U.S. 649, 658, 687 (1947) "[It's] not the amount of time an employee spends in work affecting safety, but what he may do in the time thus spent whether it be large or small determines the effect on safety. Ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one." ).

Therefore, the relevant inquiry here is whether Plaintiffs reasonably could have expected to drive interstate, which we answer by look[ing] at, among other things, whether the carrier (employer) does any interstate work, assigns drivers randomly to that driving, and maintains a company policy and activity of interstate driving.

Resch, at 874 (quotations omitted). Because Plaintiffs could *reasonably be expected to drive interstate routes as part of their duties*, even those who never did, the MCA exemption to the FLSA applied, and the entire class of driver employees was "ineligible for FLSA overtime wages." Id. at 875.

While Resch presents one of the more recent interpretations of the more narrow MCA exemption, the rationale of the Resch Court rests on significant precedent and is the same as holdings from the United States Supreme Court and numerous Courts of Appeals.<sup>19</sup>

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<sup>19</sup> See, Morris v. McComb, 332 U.S. 422 (1947) (because the employer performed covered work and was regulated by the DOT's predecessor which had the authority to regulate all of the drivers, *even those who never performed covered work*, none of the employees were eligible for overtime); Crooker v. Sexton Motors, Inc., 469 F.2d 206, 208 (1st Cir. 1972) (MCA overtime exemption applied to employee despite driving interstate only 10 or 11 times in a 34-month period); Brennan v. Schwerman Trucking Co. of Virginia, 540 F.2d 1200, 1205 (4th Cir. 1976) (MCA overtime exemption applied to company's drivers and mechanics despite less than 5% of the company's revenues deriving from interstate work. "While it may be that in the instant case few of [employer's] regular drivers have actually engaged in interstate cartage as a result of the manner in which individual hauls are assigned...[i]t is clear that the work of each of [employer's] drivers may affect the safety of operation of motor vehicles engaged in interstate commerce."); Songer v. Dillon Res., Inc., 618 F.3d 467 (5th Cir. 2010) (MCA overtime exemption applied despite the fact that during the relevant three year period, employees crossed state lines on hauling trips only 2.7%, 3.3%, and 2.3% of the time, and several employees

In the present case, the record is strikingly similar to that in Resch, as Eastern Bus is licensed and

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never crossed state lines. The Fifth Circuit found that all class members were exempt from overtime pay because, "the drivers could have been called upon to drive interstate commerce during their employment[,]" and even though "there were occasionally weeks (for all the drivers) where they were not assigned to transport property in interstate commerce."); Alexander v. Tuttle & Tuttle Trucking, Inc., 834 F.3d 866 (8th Cir. 2016)(the plaintiffs argued that the MCA overtime exemption should not apply because no single plaintiff drove interstate more than five times during the relevant period, and that as a group, the drivers drove in interstate commerce on fewer than 1% of the days employed by defendant. The Court disagreed, holding that, "'[I]t is 'the character of the activities rather than the proportion of either the employee's time or of his activities'" that determines the Secretary's jurisdiction to regulate employees[,]" and that "The [MCA] exemption applies even where interstate transportation makes up a small percentage of an employee's duties."); Marshall v. Aksland, 631 F.2d 600, 602 (9th Cir. 1980)(Court held that trucking company fell within the MCA exemption despite the fact that for at least three of the four years during the relevant period, the company *did not perform any interstate work*. The Ninth Circuit reached its conclusion because the company continued to solicit interstate work, its "drivers conformed to the Motor Carrier Safety Regulations, maintained Department of Transportation forms," and that the company "maintained [its] I.C.C. authority and held himself available for interstate business."); Starrett v. Bruce, 391 F.2d 320, 323 (10th Cir. 1968) (holding that driver working for employer who held itself out to the general public as being available for interstate business but had derived no income from interstate business was exempt from the FLSA based on possibility of driver being required to travel interstate); Harrington v. Despatch Industries, L.P., No. CIV.A. 03-12186-RGS, 2005 WL 1527630, at \*1 (D. Mass. June 29, 2005)("if some portion of [plaintiff]'s job duties impact the safety of interstate motor transportation, the MCA applies and [plaintiff] is ineligible for overtime.").

regulated by the DPU and it regularly performs covered work. Eastern Bus similarly has the authority to assign covered work to the class members and they reasonably can expect to perform such work. Thus, even if this Court *only* looks at charter service for non-municipal customers - service Plaintiffs do not dispute is regulated - the work is nevertheless "significant,"<sup>20</sup> and much greater than the percentage found in Resch - where only 1.3% of the work performed by plaintiffs was regulated interstate travel - and the additional cases cited in footnote 19. Instead, it was merely the possibility of employees performing covered work that was dispositive of whether the MCA exemption applied.

Because it is undisputed that the class members perform regulated work (i.e., drive charters) as part of

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<sup>20</sup> In only three months in 2015, one of which being March - one of the slowest for charter jobs, VI at A112, - Eastern Bus performed 997 charters **for non-municipal customers**; approximately **3,988 charter jobs** when extrapolated out over the full year. An average of just under **11 charters per day, every day, for 365 days a year**. Further, even if this Court were to use Plaintiffs' calculations, supported by an Affidavit of Plaintiffs' counsel who has neither worked for Eastern Bus, nor has any firsthand knowledge of its charter business, it is undisputed that Eastern Bus performed **at least 885 charters for non-municipal customers in only three months**, approximately **3,540 charter jobs** when extrapolated out over the full year. An average of just under **10 charters per day, every day, for 365 days a year**. VII at A363-64.

their normal duties, the Superior Court's Order should be vacated even if the state exemption is read similarly to the narrower MCA standard.

**c) Charter Service Performed For Municipal Customers  
Is Similarly Regulated by 159A**

The Superior Court also erred in holding that charter service provided to municipal customers, which is identical to the charter service provided to private customers, is not similarly regulated pursuant to Chapter 159A. The Court reached its conclusion without any discussion or analysis, incorrectly holding that Defendants' argument - that charter service provided to municipal customers *is* similarly regulated pursuant to Chapter 159A - "was already rejected by the prior session judge in his Memorandum and Order on the defendants' motion to dismiss." See, Casseus (II), at \*2.<sup>21</sup> However, this issue was neither briefed nor argued

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<sup>21</sup> This was based on an exception listed in Chapter 159A that "[t]he term[] 'charter service'...shall not include the transportation of school children to and from school pursuant to a written contract with a municipality or municipal board or with the authorities of such school[.]" M.G.L. c. 159A, § 11A. As will be explained below, this exception only applies to transporting school children to school from home in the morning and from school to home in the afternoon, and **not** to charter service performed for schools.

at the Rule 12 stage before,<sup>22</sup> and thus, the Superior Court should not have relied on the prior decision.<sup>23</sup>

**i. The Department of Labor and Workforce Development Defines "Charter Work" for Schools in Massachusetts as "Pupil Transportation Other than Trips Between Home and School"**

The DLWD, the agency charged with administering both the Massachusetts overtime law and the state prevailing wage law, has provided clear guidance on the term "charter work" under the prevailing wage law, finding that any transportation of school children, other than trips between home and school, is charter service.<sup>24</sup>

In an Opinion Letter the DLWD found that "charter work" provided to municipal customers, is distinct from "school transportation," stating that,

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<sup>22</sup> The only argument presented on this issue at the Mass. R. Civ. P. 12 stage was made in Plaintiffs' Cross-Motion for Summary Judgment, which was summarily denied without argument or consideration. See, Casseus (I), at \*3, n.4 ("Declining to treat the Defendants' Rule 12 Motion as a motion for summary judgment, therefore the Court will summarily deny the Plaintiffs' Cross-Motions for Summary Judgment ... as moot."). **The judge similarly informed the parties at the oral argument that he was not considering facts or argument outside of the Rule 12 Motion.**

<sup>23</sup> Even if this issue had been fully considered by the Superior Court, its finding is nevertheless incorrect and should be reversed.

<sup>24</sup> There are no other statutes in Massachusetts, beyond M.G.L. c. 159A, that govern licenses to provide charter service for companies (Subsection 11A) and their employees (Subsection 9).

**'charter work, '...is commonly held to mean pupil transportation other than trips between home and school.**

Op. Letter, PW-2001 05-6.9.01 (June 9, 2001) (emphasis added).

Further, the Massachusetts prevailing wage law applies different wage rates to school transportation and charter work.

The Division of Occupational Safety...responds to requests from cities and town regularly for prevailing wage schedules to be included in contracts that cover **charter work as well as trips between home and school**. In fact, several awarding authorities have requested prevailing wage schedules for contracts **involving charter work only, separate and apart from** the contracts covering **trips between home and school**.

See id.; see also, VI at A136-38.

The DLWD's distinction further demonstrates that "charter service" performed for schools should not be lumped into the definition of "school transportation," since the latter is limited to transporting pupils to school from home in the morning and from school to home in the afternoon, and thus, falls outside of the exception language in Chapter 159A.

The DLWD's interpretation is not only consistent with the plain language of Chapter 159A, but it is the most rational interpretation, given that the charter

service performed for school customers (e.g., taking a group of students from one point to another, waiting for them to finish, and then driving them back to school), is the same exact charter service as performed for private customers (e.g., taking a group on non-students from one point to another, waiting for them to finish, and then driving them back), and thus, the Legislature's policy rationale for the common carrier overtime exemption is the same. Neither the Plaintiffs, nor the Superior Court, provided any authority or support for the conclusion that charter service for municipal clients is not charter work regulated under Chapter 159A.

**ii. The Supreme Judicial Court has Made Clear that "Charter Services" Performed for Schools Requires a Chapter 159A, §11A Charter License**

No Massachusetts appellate court has yet interpreted the overtime exemption under Chapter 151, § 1A(11), however, the SJC has made clear that companies providing charter services for private companies and schools are engaged in providing charter services for purposes of Chapter 159A. In AA Transportation Co., Inc. v. Commissioner of Revenue, 454 Mass. 114 (2009), the SJC considered the different licenses issued pursuant to

Chapter 159A, as well as the types of services provided by transportation companies that hold those licenses.

The [DPU] licenses bus transportation as ... "charter," "school," and "special" services under G.L. c. 159A, § 11A ... 'Charter services' are those in which a particular group of people has exclusive use of the entire vehicle for one trip and the vehicle may take any route to its destination. See G.L. c. 159A, § 11A ... From 1996 until 2002, [Employer] was engaged in providing charter services for schools and private companies.

AA Transportation Co., Inc., 454 Mass. at 115, 117

(emphasis added).

Thus, while AA Transportation Co. concerned whether a company was entitled to a tax abatement under M.G.L. c. 64H, § 6(aa), based upon a company holding a Chapter 159A License, the SJC nevertheless found that AA Transportation, a private bus company (like Eastern Bus), which held a Chapter 159A, § 11A Charter License (like Eastern Bus), provided charter services for private companies and schools (like Eastern Bus). Id. at 116 ("in 1996, AA Transportation acquired a §11A License...From 1996 until 2002, AA Transportation was engaged in providing charter services for schools[.]")(emphasis added)).

Importantly, The SJC did not distinguish between the performance of charter service for schools and

private groups, and specifically referenced AA Transportation's Chapter 159A, Section 11A Charter License when referring to its school-related charter service.<sup>25</sup>

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<sup>25</sup> In further support of this interpretation is the manner in which the City of Boston Public Schools has recognized school charters as needing to be served by a Chapter 159A-licensed carrier. Since its creation, Eastern Bus has bid on several contracts to perform "Field Trip Transportation" for the City of Boston Public Schools. In order to bid and be considered by the City, Mr. Winitzer was required to certify, on behalf of Eastern Bus, that the Company **"is licensed by the Commonwealth to provide charter service"**, and that its drivers are **"properly licensed to provide charter service."** VI at A92-96 (emphasis added).

There is no dispute that Chapter 159A is the only Massachusetts statute under which employers and their employees are licensed to provide charter service. Significantly, Boston solicits separate bids for companies to perform school transportation (i.e., transporting students from home to school in the morning and from school to home in the afternoon). A separate bus company, Veolia Transportation Services, Inc., contracted with the city to perform school transportation, and neither Veolia, nor any other prospective bidder, was required to certify on its bid that it was licensed to perform charter service. VI at A97. Contrary to the tortured construction pressed by Plaintiffs in attempting to distinguish school charters from non-school charters, it is significant that the largest municipality in the Commonwealth will not consider contracting with a private bus company to perform field trip charter service for its schools unless the company is licensed by the state to perform charter service under Chapter 159A.

**iii. Courts in Other Jurisdictions as well as Federal Administrative Guidance Further Supports a Finding that "Charter Service" Includes Transportation for Field Trips, Athletic Events and Other Extracurricular Activities**

While there is clear guidance in Massachusetts from both the SJC and the DLWD demonstrating that charter service performed for schools is similarly regulated pursuant to Chapter 159A, there are several judicial decisions from other jurisdictions, as well as guidance from federal agencies, that similarly support a finding that "charter service" performed for schools is distinct from regular school transportation (i.e., transporting students to and from home and school).

For instance, in N.L.R.B. v. Cook County School Bus, Inc., 283 F.3d 888, 890 (7th Cir. 2002), the Seventh Circuit reviewed a case concerning the early termination of a collective bargaining agreement and, *inter alia*, employee bidding for "charter" jobs for schools, *in addition to* their other duty consisting of "transportation to and from school." The Court of Appeals distinguished the two services.

In addition to offering transportation to and from school, the Company provides charters for schools (for things like athletic events and field trips) and for private groups.

Cook Cty. Sch. Bus, Inc., 283 F.3d at 890(emphasis added); see also, Almy v. Kickert Sch. Bus Line, Inc., 722 F.3d 1069 (7th Cir. 2013)(Court of Appeals specifically differentiated between trips between home and school, and "**other chartered school trips**," which included picking children up at school and driving them to destinations other than their homes. "In addition to his regular route, [plaintiff] **also drove charter trips** for Illinois schools[.]")(emphasis added); Chicago Transit Auth. v. Adams, 607 F.2d 1284, 1292 (7th Cir. 1979)("we believe that the language of the charter regulation describes a single trip or series of trips for school students **rather than** daily transportation at the beginning and end of each school[.]"<sup>26</sup>).

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<sup>26</sup> Significantly, the "charter regulation" interpreted by the Seventh Circuit is nearly identical to the Massachusetts definition: "transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles of service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance or modified after having left the place of origin. (This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment.)"; M.G.L. c. 159A, § 11A ("'Charter service' is hereby defined as the transportation of groups of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle have acquired the exclusive use of the vehicle for the duration of a particular trip or tour[.]").

Further, the Federal Motor Carrier Safety Administration ("FMCSA"), which is the federal government agency responsible for regulating and providing safety oversight of commercial motor vehicles, issues guidance that has similarly distinguished school bus transportation (i.e., the transportation of school children from home to school and from school to home) from transporting students to and from school related functions (i.e., charter service):

**'school bus operation' means the use of a school bus to transport school children and/or school personnel from home to school and from school to home ...** However, anyone operating school buses under contract with a school is a for-hire motor carrier. When a nongovernment, for-hire motor carrier **transports children to school-related functions other than 'school bus operation' such as sporting events, class trips, etc.,** and operates across State lines, its operation must be conducted in accordance with the FMCSRs.

See <https://www.fmcsa.dot.gov/print/regulations/title49/section/390.3?guidance> (last accessed on November 25, 2016)(emphasis added).

The analogous interpretation by Federal courts of appeals and the FMCSA further demonstrate that Plaintiffs' reading of the exception language in Chapter 159A, § 11A is incorrect, and the Superior Court's

decision, made without any analysis or discussion of these arguments is clearly erroneous.

**iv. Eastern Bus's Municipal Contracts Demonstrate the Difference Between "School Transportation" and Charter Transportation Provided to Schools**

The municipal contracts to which Eastern Bus is a party create separate payment terms for school transportation, for which payments are guaranteed and predetermined based on the 180 day school year, and charter service, which is utilized and paid for only on an as-needed basis, in a manner identical to payment for private charters.<sup>27</sup> The Commonwealth similarly sets different prevailing wage rates for "school transportation" and "charter service" under the state prevailing wage law. VI at A136-38. If, as Plaintiffs assert, transportation to and from school in the morning and afternoon is identical to charter service performed for schools, there is no rational basis for

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<sup>27</sup> See e.g., VI, at A132-A134 (Belmont contract) ("...The **athletic or fine arts trips** should be quoted on the basis of...school field trips **paid by other than School Budget funds**..."); (Brookline contract) ("Contractor must assess what is required in order to provide service for all athletic events and field trips **in addition to** the regular daily service."); (Cambridge contract) ("the City makes no guarantees as to the number of Athletic or Field Trips ... Contractor will provide transportation for **field trips, athletics and special trips ... on a fee for service basis**."); VI at A58-A61.

Massachusetts to set different prevailing wage rates for each type of work.

It is clear that charter service performed for both municipal and private customers is regulated pursuant to Chapter 159A. The sheer volume of *all* charters performed by Eastern Bus (in *only* three months in 2015, Eastern Bus performed **2,300** charters; extrapolated over the full year, Eastern Bus performed approximately **9,200 charter jobs**, for an average of just under **25 charters per day, every day, for 365 days during the year**)

further demonstrates that the Superior Court erred in finding Section 1A(11) inapplicable to the class members in this case.

#### **IV. CONCLUSION**

For each of the foregoing reasons, Defendants respectfully request that this Court vacate the Superior Court's Order and grant Defendants' Motion for Summary Judgment.

Respectfully submitted,

EASTERN BUS COMPANY, INC., and  
CHUCK WINITZER

By their attorneys,

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Dated: December 9, 2016

**Certification Pursuant to Mass. R. A. P. 16(k)**

I, Damien M. DiGiovanni, hereby certify that the foregoing Brief of the Defendants-Appellants Eastern Bus Company and Charles "Chuck" Winitzer complies with the rules of court that pertain to the filing of briefs, including but not limited to each of the provisions of Mass. R.A.P. 16.

/s/Damien M. DiGiovanni  
Damien M. DiGiovanni

**CERTIFICATE OF SERVICE**

I, Damien M. DiGiovanni, hereby certify that on the 9th day of December 2016, this document and accompanying documents were served by electronic mail, per agreement of the parties, upon counsel for Plaintiffs.

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COMMONWEALTH OF MASSACHUSETTS  
THE SUPERIOR COURT

MIDDLESEX, ss.

DOCKET NO. 14-CV-4917-H

IBNER CASSEUS et al.<sup>1</sup>

v.

EASTERN BUS COMPANY, INC. et al.<sup>2</sup>

**MEMORANDUM OF DECISION AND ORDER ON  
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Ibner Casseus and Lyonel Telfort, drivers for the Eastern Bus Company, Inc., have sued that company and its owner and president, Chuck Winitzer, for failure to pay overtime wages, in violation of G. L. c. 151, §§ 1A and 1B. In addition, Mr. Telfort has sued for retaliatory termination in violation of G. L. c. 151, § 19 and G. L. c. 149, § 150.

The case is before the court on the plaintiffs' and defendants' cross-motions for summary judgment, which focus primarily on a single question of statutory interpretation: whether the overtime exemption for employees of an employer licensed and regulated as a charter transportation service applies to the plaintiffs. The summary judgment record contains no facts material to a prior session judge's consideration of, and ruling on, this question of law in this case. Therefore, that earlier determination must stand: the overtime exemption does not apply, and the bus

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<sup>1</sup> Lyonel Telfort, on behalf of themselves and all others similarly situated.

<sup>2</sup> Chuck Winitzer.

driver plaintiffs are now entitled to summary judgment on their claim for overtime wages. The defendants also seek summary judgment as to Mr. Telfort's retaliation claim. Because there are numerous disputes of material fact regarding the defendants' stated reasons for Mr. Telfort's termination, summary judgment must be denied.

### **BACKGROUND**

Eastern Bus is a charter bus company that provides transportation services to a variety of entities, including school districts throughout Massachusetts. As such, it is required to, and does, hold a charter services license under G. L. c. 159A. Eastern Bus is employed by both municipal and private entities in about equal measure; 43.3% of all charter jobs it performed in 2015 were for non-municipal clients. Its work for municipal clients includes contracts to transport children to, and from, school in the mornings and evenings, as well as to and from school-sponsored events such as field trips and athletic competitions.

Messrs. Casseus and Telfort, and other individuals employed as drivers by Eastern Bus are assigned to drive routes that Eastern Bus designates as either "school" or "charter." School routes are those routes that involve transporting students to and from school in the mornings and evenings. All other routes are charter routes. Eastern Bus pays its drivers one rate for school routes and another for charter routes, but makes no distinction between charter routes performed for municipal (school) clients and other clients.

During the school year, drivers usually work between 25 and 40 hours each week driving school routes. They may also exceed 40 hours a week driving only school routes, or as a result of the combination of school routes and charter routes driven for school clients. Eastern Bus pays no overtime wages to its drivers.

### **ANALYSIS**

On a motion for summary judgment, it is the moving party's burden to show that there is "no genuine issue of material fact and that [it] is entitled to judgment as a matter of law." *Madsen v. Erwin*, 395 Mass. 715, 719 (1985). The moving party may meet this burden "either through affirmative evidence or by showing an absence of evidence to support an essential element of the nonmoving party's claim." *Dennis v. Kaskel*, 79 Mass. App. Ct. 736, 741 (2011), citing *Flesner v. Technical Communications Corp.*, 410 Mass. 805 (1991). In considering such a motion, courts must view the facts, and the inferences that can reasonably be drawn from them, in the light most favorable to the nonmoving party. *Coveney v. President & Trustees of the College of the Holy Cross*, 388 Mass. 16, 17 (1983).

#### **I. Failure to Pay Overtime Wages**

General Laws c. 151, § 1A(11) provides employers must pay overtime wages, unless the employee "is employed . . . by an employer licensed and regulated pursuant to [G. L. c. 159A]." It is undisputed that for purposes of its non-school-related charter work, Eastern Bus is licensed and regulated under Chapter 159A, and is thus at least partially exempt from the Chapter 151 overtime requirement. However,

earlier in this case, a prior session judge ruled that this exemption does not cover Eastern Bus's "particular employment of Plaintiffs to transport children to and from school [and school-related events]" because that activity "is neither conducted pursuant to, nor subject to regulation by virtue of, [its chapter 159A] [c]harter [s]ervices [l]icense."

Eastern Bus now contends that because, as a company, it performs a significant amount of charter work that is regulated under Chapter 159A, any non-regulated (and thus non-exempt) work performed by Mr. Casseus, Mr. Telfort, or similarly situated employees is so minimal that they are not entitled to overtime wages even for non-regulated, non-exempt work in excess of 40 hours per week. It also revives its argument that transport of children to and from school-related events, under a contract with the school, is not "school" work and should fall within the exemption. The former is unpersuasive and is unsupported by Massachusetts case law; the latter was already rejected by the prior session judge in his Memorandum and Order on the defendants' motion to dismiss.

The court's previous holding was clear: the overtime exemption for employers regulated under Chapter 159A is not a blanket exemption that applies to all employees, whether or not their actual work is related, or performed under the fact of the employer's regulation. The summary judgment record is also clear: Mr. Casseus, Mr. Telfort, and other drivers employed by Eastern Bus performed, and did not receive overtime wages for some amount of non-regulated, and thus non-exempt,

work in excess of 40 hours per work. They are therefore entitled to payment for that work, and summary judgment shall enter on their claim for violation of G. L. c. 151, §§ 1A and 1B.

## **II. Retaliatory Termination**

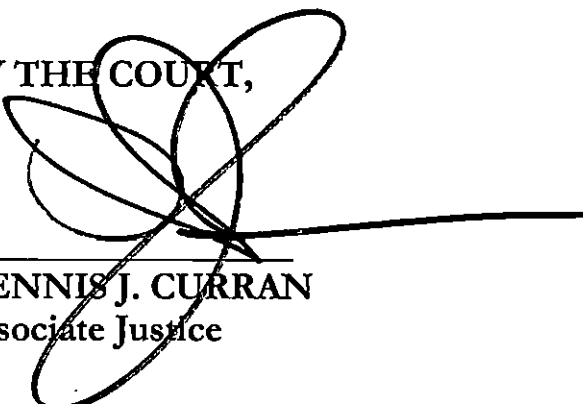
In order to prevail on a claim for retaliatory termination in violation of G. L. c. 151, § 19 and G. L. c. 149, § 150, Mr. Telfort must demonstrate that “(1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) the adverse employment action was causally related to the protected activity.” *Karatihy v. Com. Flats Dev. Corp.*, 84 Mass. App. Ct. 253, 255 (2013), citing *Mole v. Univ. of Mass.*, 442 Mas. 582, 591-92 (2004). It is undisputed that Mr. Telfort’s participation in this suit is protected activity, and that his employment at Eastern Bus was terminated after the suit was filed. However, there is a dispute as to the cause of his termination: Eastern Bus contends that it was due to Mr. Telfort’s disciplinary lapses including several “no call/no show” absences; Mr. Telfort denies that these “no call/no show” absences ever occurred. Because the summary judgment record contains conflicting deposition and documentary evidence as to whether Mr. Telfort was ever a “no call/no show” absentee, as well as other conflicting evidence regarding the reasons and circumstances behind Mr. Telfort’s termination, a jury could equally conclude that Eastern Bus’s stated disciplinary reasons are true, or instead, that they were a pretext to disguise unlawful discriminatory animus against Mr. Telfort due to his protected activity. See *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 502 (2001) (“[W]e permit the fact

finder to infer discriminatory animus (and causation) from proof that the employer offered a false reason for the adverse employment decision”). Therefore, a dispute of material fact exists as to the cause of Mr. Telfort’s termination. Eastern Bus is not entitled to summary judgment on this claim.

**CONCLUSION AND ORDER**

Accordingly, the plaintiff’s motion for partial summary judgment is **ALLOWED** and the defendant’s motion for summary judgment is **DENIED**.

BY THE COURT,



DENNIS J. CURRAN  
Associate Justice

June 4, 2016

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XXI** LABOR AND INDUSTRIES**Chapter 151** MINIMUM FAIR WAGES**Section 1A** OVERTIME PAY; EXCLUDED EMPLOYMENTS

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Section 1A. Except as otherwise provided in this section, no employer in the commonwealth shall employ any of his employees in an occupation, as defined in section two, for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of forty hours at a rate not less than one and one half times the regular rate at which he is employed. Sums paid as commissions, drawing accounts, bonuses, or other incentive pay based on sales or production, shall be excluded in computing the regular rate and the overtime rate of compensation under the provisions of this section. In any work week in which an employee of a retail business is employed on a Sunday or certain holidays at a rate of one and one-half times the regular rate of compensation at which he is employed as provided in chapter 136, the hours so worked on Sunday or certain holidays shall be excluded from the calculation of overtime pay as required

by this section, unless a collectively bargained labor agreement provides otherwise. Except as otherwise provided in the second sentence, nothing in this section shall be construed to otherwise limit an employee's right to receive one and one-half times the regular rate of compensation for an employee on Sundays or certain holidays or to limit the voluntary nature of work on Sundays or certain holidays, as provided for in said chapter 136.

This section shall not be applicable to any employee who is employed:?

(1) as a janitor or caretaker of residential property, who when furnished with living quarters is paid a wage of not less than thirty dollars per week.

(2) as a golf caddy, newsboy or child actor or performer.

(3) as a bona fide executive, or administrative or professional person or qualified trainee for such position earning more than eighty dollars per week.

(4) as an outside salesman or outside buyer.

(5) as a learner, apprentice or handicapped person under a special license as provided in section nine.

(6) as a fisherman or as a person employed in the catching or taking of any kind of fish, shellfish or other aquatic forms of animal and vegetable life.

(7) as a switchboard operator in a public telephone exchange.

(8) as a driver or helper on a truck with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section two hundred and four of the motor carrier act of nineteen hundred and thirty-five, or as employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act or subject to title II of the Railway Labor Act.

(9) in a business or specified operation of a business which is carried on during a period or accumulated periods not in excess of one hundred and twenty days in any year, and determined by the commissioner to be seasonal in nature.

(10) as a seaman.

(11) by an employer licensed and regulated pursuant to chapter one hundred and fifty-nine A.

(12) in a hotel, motel, motor court or like establishment.

(13) in a gasoline station.

(14) in a restaurant.

(15) as a garageman, which term shall not include a parking lot attendant.

(16) in a hospital, sanatorium, convalescent or nursing home, infirmary, rest home or charitable home for the aged.

(17) in a non-profit school or college.

(18) in a summer camp operated by a non-profit charitable

corporation.

(19) as a laborer engaged in agriculture and farming on a farm.

(20) in an amusement park containing a permanent aggregation of amusement devices, games, shows, and other attractions operated during a period or accumulated periods not in excess of one hundred and fifty days in any one year.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XXI** LABOR AND INDUSTRIES**Chapter 151** MINIMUM FAIR WAGES**Section 1B** OVERTIME COMPENSATION; FAILURE TO PAY;  
PENALTIES; COLLECTION PROCEEDINGS; UNCLAIMED  
AWARDS; DEPOSIT OF FUNDS

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Section 1B. Any employer or the officer or agent of any corporation who pays or agrees to pay to any employee less than the overtime rate of compensation required by section one A shall have violated this section and shall be punished or shall be subject to a civil citation or order as provided in section 27C of chapter 149, and each week in which such employee is paid less than such overtime rate of compensation and each employee so paid less, shall constitute a separate offense. In addition, if a person is paid by an employer less than such overtime rate of compensation, the person may institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for the full amount of the overtime rate of compensation less any amount actually paid to him by the employer. An agreement between the

person and the employer to work for less than the overtime rate of compensation shall not be a defense to such action. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for lost overtime compensation and shall also be awarded the costs of the litigation and reasonable attorneys' fees. At the request of any employee paid less than such overtime rate of compensation, the attorney general may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The attorney general shall not be required to pay a filing fee in connection with any such action.

In any action or administrative proceeding by an employee or the commissioner instituted upon such a wage claim in which the employee prevails and the commissioner thereafter in possession of the resulting award is unable after a reasonable search to locate the employee or to identify and locate the employee's successor in interest, the commissioner shall, upon expiration of one year from the date of said award, deposit the funds from any such award, less costs and reasonable attorney's fees where applicable, in the General Fund.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XXII** CORPORATIONS**Chapter** COMMON CARRIERS OF PASSENGERS BY MOTOR  
**159A** VEHICLE**Section 11A** CHARTER, SCHOOL OR SPECIAL SERVICE VEHICLES;  
LICENSE; RULES AND REGULATIONS

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Section 11A. No person shall operate or offer to provide service by means of any motor vehicle carrying ten or more persons, including the driver, upon any public way in charter service, as hereinafter defined, unless he shall have obtained from the department a license to engage in the business of rendering such service and certifying that the rendering of such service is consistent with the public interest, that public convenience and necessity require it and that the applicant is fit, willing and able properly to perform such service. "Charter service" is hereby defined as the transportation of groups of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle have acquired the exclusive use of the vehicle for the duration of a particular trip or tour and in such a

manner as not to be subject to section one. The department may, after public hearing, grant or refuse to grant a license to engage in the business of rendering charter service, and may, after notice and hearing, suspend or revoke such a license for cause. Notice of such public hearing shall be given to each holder of a license issued under this section who is doing business in the city or town in which the proposed service is to be located or in contiguous cities or towns and to each holder of a certificate issued under section seven who is doing business in such city or town. Any such license shall remain in force except while so suspended, until so revoked.

No person shall operate any motor vehicle carrying ten or more persons, including the driver, upon any public way in special service, or school service, as hereinafter defined, unless he shall have obtained from the department a permit to render such special service, or school service, certifying that the rendering of such special service or school service is consistent with the public interest, and public convenience requires it. "Special service" is hereby defined as the transportation by motor vehicle over a route other than one certified to the applicant under section seven, for any special purpose, event or occasion or series of events or occasions, or under contract to a business establishment or for the transportation of employees to a place of employment, of a number of passengers to whom the carrier itself, or some person in its behalf, has sold or intends to sell tickets for transportation service, whether such tickets are for transportation alone or are in

the form of combination tickets. The application for a special service permit shall designate the specific point or points of origin and destination proposed to be served. "School service" is hereby defined as the transportation, by motor vehicle over a route other than one certified to the applicant under section seven, of children to and from school and summer day camp. No special service or school service permit shall be issued in any city or town as the point of origin other than to the holder of a certificate under section seven who has a certificated route in said city or town, unless there is no such certificate holder in such city or town, or unless the holder of said certificate is not fit, willing and able properly to perform the special service or school service applied for, and no such permit shall be issued to operate over a route over which or approximately over which a carrier has a certificate to operate under section seven, if said carrier is fit, willing and able properly to perform the special service or school service applied for. The department may grant or refuse to grant a permit for such special service, or school service, upon application, after not less than seven days' notice by mail directed to such holders of certificates issued under section seven and of permits issued under this section serving the cities or towns of origin named in such application as might, in the judgment of the department, be interested in such service. In the event that the department considers that any objection filed with it before the return date warrants further consideration, it shall hold such hearing on such notice as it may require, and shall thereupon grant or refuse to

grant such permit. Special service permits shall be granted only to the holder of a license issued under this section authorizing him to engage in the business of rendering charter service and the department may, after notice and hearing, revoke such permit for cause. Such special service or school service shall not be subject to section one.

The department may make suitable and reasonable rules, orders and regulations covering the operation of motor vehicles both under section one and in such charter service, special service, or school service, and may revise, alter, amend or annul the same. The department shall also establish minimum mileage rates for any such charter service operated in intrastate commerce within the commonwealth, and may revise, alter, amend or annul such rates, and in determining such rates the department shall consider as part of the rate base the elements of waiting service and type of equipment employed. The terms "charter service", "special service" or "school service" shall not include the transportation of school children to and from school pursuant to a written contract with a municipality or municipal board or with the authorities of such school, provided that the charges for such transportation are borne by such municipality or municipal board or school and provided, further, that no special charges for such transportation are made by the municipality or municipal board or such school on account of the children transported; or the operation of a motor vehicle so used and owned and operated by such authorities; or the

operation of sight-seeing automobiles licensed under chapter three hundred and ninety-nine of the acts of nineteen hundred and thirty-one.

Sections six, eight, nine, eleven, thirteen, fourteen and fifteen shall apply to the operation of charter service under a license granted under this section and to special service or school service under a permit issued under this section, but vehicles for which vehicle permits have been issued under section eight and drivers who hold drivers' licenses under section nine shall not be required to have additional vehicle permits and drivers' licenses for operation in charter service or special service.

No licensee under this section shall change his address, place of business, the place where his buses or any of them are usually garaged, or his base of operations from one city or town to another, unless such change shall be approved by the department after a public hearing and notice to the holders of other licenses under this section in the city or town into which said change is sought to be made, and in the adjacent cities and towns thereto, and to holders of certificates issued under section seven, who are doing business in such city or town, and unless a finding is made by said department that such change is consistent with the public interest and that public convenience and necessity require such change.

This section shall not be construed so as to prohibit the use of school buses under contract to a school system in transporting pupils to and from summer school and school sponsored extracurricular activities.